

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE
CRIMINAL APPEAL NO.34 OF 1993

Sham Shankar Kankaria,)
Aged about 28 years, residing at)
Thakare Road, House No.99, Nasik,)
District - Nasik.).. Appellant
(Org.Accused No.1)

Versus

1. The State of Maharashtra,)
2. Mrs.Hirabai Kashinath Kedare,)
r/o. H.No.1342, Bhadrakali,)
Nasik.).. Respondents
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Shri M.S.Karnik for the appellant.
Shri B.H.Mehta, APP for State-Respondent.
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WITH
CRIMINAL APPEAL NO.110 OF 1993

Shri Dattatraya Vinayak Bothare,)
Aged about 23 years, residing at)
Old Tambat Lane, House No.1785,)
Nashik, District - Nashik.).. Appellant
(Org.Accused No.6)

Versus

1. The State of Maharashtra,)
2. Mrs.Hirabai Kashinath Kedare,)
r/o. H.No.1342, Bhadrakali,)
(Khadkalli), Nasik.).. Respondents
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Mrs.Latika Khemani for Shri Prakash Khemani for
appellant.
Shri B.H.Mehta, APP for State-Respondent.
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WITH

CRIMINAL

APPEAL

NO.111

OF

1993

Khandu Deoram Abhang,)
Aged about 19 years, residing at)
Tambat Lane, House No.1785, Nashik,))
District - Nashik.).. Appellant)
(Org.Accused No.5)

Versus

1. The State of Maharashtra,)
2. Mrs.Hirabai Kashinath Kedare,)
r/o. H.No.1342, Bhadrakali,)
Nasik.).. Respondents

Shri	D.A.Patil		for	appellant.
Shri	B.H.Mehta,	APP	for	State-Respondent.
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WITH

CRIMINAL

APPEAL

NO.112

OF

1993

Sanjay	alias	Jaya	Nandkumar	Ranbhise)
Aged about 21 years,			)	
Occupation -	Service,	residing	at	)
Renuka Nagar, E-1/2, Nashik,			)	
District - Nashik.			).. Appellant	
			(Org.Accused	No.3)

Versus

1. The State of Maharashtra,	)
2. Mrs.Hirabai Kashinath Kedare,	)
r/o. H.No.1342, Bhadrakali,	)
Nasik.	).. Respondents

Shri	N.V.Walawalkar	for	the	appellant.
Shri	B.H.Mehta,	APP	for	State-Respondent.

CRIMINAL APPEAL NO.114 OF 1993

No.4)

Versus

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Shri B.G.Vaidya for the Appellant.

Shri B.H.Mehta, APP for the State.

CRIMINAL APPEAL NO.116 OF 1993

No.4,)

No.2)

Versus

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).. Respondents

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Shri Niteen Pradhan with Ms.S.D.Khot for the Appellant.

Shri B.H.Mehta, APP for the State.

WITH

CRIMINAL

APPEAL

NO.241

OF

1993

The State of Maharashtra.

).. Appellant

Versus

1. Sham Shankar Kankaria,)
Age 28 years, r/o. Thakare Road,)
House No.99, Nasik.)
2. Raju Ayyub Pathan,)
age 21 years, r/o.Jagadeshvar)
Society, Sahakar Nagar,)
Block No.4, Ganjmal, Nashik.)
3. Sanjay Nandkumar Ranbhise,)
age 21 years, r/o.Renuka Nagar,)
Room No.C/5/9, Nashik.)
4. Rajesh Bajirao Bhavar,)
age 21 years, r/o. Mahasrul,)
H.No.1925, Nashik.)
5. Khandu Deoram Abhang,)
age 18 years, r/o. Navapura,)
Thakare Road, Nashik, H.No.113.)
6. Dattatraya Vinayak bothre,)
age 23 years, r/o.Old Tambat)
Lane, H.No.1785, Nashik.)
).. Respondents
(Org.Accused Nos.1 to 6)

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B.H.Mehta, APP for the Appellant- State.
Shri M.S.Karnik for respondent No.1 - Accused No.1.
Shri Niteen Pradhan with Ms.S.D.Khot for respondent
No.2 - the accused No.2.
Shri N.V.Walawalkar for respondent No.3 - the accused
No.3.

Shri B.G.Vaidya for Respondent No.4- the accused No.4.

Shri D.A.Patil for Respondent No.5 - Accused No.5.

Smt.Latika Khemani for Respondent No.6 - Accused No.6.

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WITH
CRIMINAL APPEAL NO.242 OF 1993

The State of Maharashtra.) .. Appellant

Versus

1. Sham Shankar Kankaria,)
Age 28 years, r/o.Thakare Road,)
House No.99, Nasik.)
 2. Raju Ayyub Pathan,)
age 21 years, r/o.Jagadeshvar)
Society, Sahakar Nagar,)
Block No.4, Ganjmal, Nashik.)
 3. Sanjay Nandkumar Ranbhise,)
age 21 years, r/o.Renuka Nagar,)
Room No.C/5/9, Nashik.)
 4. Rajesh Bajirao Bhavar,)
age 21 years, r/o. Mahasrul,)
H.No.1925, Nashik.)
 5. Khandu Deoram Abhang,)
age 18 years, r/o. Navapura,)
Thakare Road, Nashik, H.No.113.)
 6. Dattatraya Vinayak Bothre,)
age 23 years, r/o. Old Tambat)
Lane, H.No.1785, Nashik.)
-).. Respondents
(Org.Accused Nos.1 to 6.)

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Shri B.H.Mehta, APP for the Appellant - State.

Shri M.S.Karnik for respondent No.1- Accused No.1.

Shri Niteen Pradhan with Ms.S.D.Khot for respondent
No.2- Accused No.2.

Shri N.V.Walawalkar for Respondent No.3- Accused No.3.

Shri B.G.Vaidya for Respondent No.4-the accused No.4.

Shri D.A.Patil for Respondent No.5- Accused No.5

Smt.Latika Khemani for Respondent No.6- Accused No.6.

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CORAM : R.M.S.KHANDEPARKAR &

R.S.MOHITE, JJ

DATED : 14th SEPTEMBER, 2004.

JUDGMENT : (Per R.M.S.Khandeparkar, J)

1. All these appeals arise from the judgment and order dated 6th February, 1993 passed by the 3rd Additional Sessions Judge, Nasik, in Sessions Case No.126 of 1992 whereby the accused No.1 therein being convicted for the offence punishable under Section 304 (II) of Indian Penal Code and being sentenced to undergo rigorous imprisonment for six years and to pay a fine of Rs.3,000/- in default to undergo rigorous imprisonment for one year and the accused Nos.2 to 6 being convicted for the offence under Section 325 read with 34 of Indian Penal Code and each of them being sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.2,000/- in default to undergo rigorous imprisonment for six months, and further the accused Nos.1 to 6 being also convicted for the offence under Section 342 read with 34 of Indian Penal Code and each of them being sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs.300/- in default to undergo rigorous imprisonment for one month. While the accused Nos.1 to 6 being acquitted of the offences under Section 302 read with 34 of the Indian Penal Code and Section 135 of the Bombay Police Act. The substantive sentence of

imprisonment awarded against the accused No.1 for the offences punishable under Section 304(II) as well as under Section 342 of Indian Penal Code has been ordered to run concurrently, so also the sentence imposed upon the accused Nos.2 to 6 under Section 325 and 342 read with Section 34 of the Indian Penal Code has been also ordered to run concurrently.

2. The Appeal No.34 of 1993 is by the accused No.1 Sham Shankar Kankaria; the Criminal Appeal No.110 of 1993 is by the accused no.6 Dattatraya Vinayak Bothare; the Criminal Appeal No.111 of 1993 is by the accused No.5 Khandu Deoram Abhang; the Criminal Appeal No.112 of 1993 is by the accused No.3 Sanjay alias Jaya Nandkumar Ranbhise; the Criminal Appeal No.116 of 1993 is by the accused No.2 Raju Ayyub Pathan; and the Criminal Appeal No.114 of 1993 is by the accused No.4 Rajesh Bajirao Bhavar. The Criminal Appeal No.241 of 1993 is by the State against the acquittal of the accused Nos.1 to 6 of the charge under Section 302 read with 34 of the Indian Penal Code and Section 135 of the Bombay Police Act, and the Criminal Appeal No.242 of 1993 is also by the State for enhancement of the sentence. All these appeals were heard together and are being disposed of by this common judgment.

3. The prosecution case in brief is that on 13th January, 1992 one Vijay @ Bablu, the son of Kashinath

Kedare, who was residing with his parents and other members of the family in House No.1342, situated at Khadkali area of Nasik city, was called by the accused No.3 Sanjay and the accused No.5 Khandu, and, therefore, he left his house at about 8.00 p.m. along with the said accused. He did not return till late night. At about 2 O'clock in the night between the 13th and 14th January, 1992, Khandu went to the house of Vijay and knocked the door of his house. On opening the door by Sanjay Kedare (P.W.9), the accused No.5 Khandu informed Sanjay that his brother Vijay was assaulted and was lying at some place. Sanjay thereupon accompanied Khandu who took him to Bharati Lodge, and further to the top floor of the Lodge where Sanjay found his brother Vijay in injured condition tied to the cot with his hands and legs tied. Sanjay also saw some blood oozing out from the head of Vijay. Sanjay released the hands and legs of Vijay and asked him as to how it had happened, whereupon he was told by Vijay that all the six accused after he being tied to the cot, assaulted him severely with instruments like iron pipe and wooden stick on the allegation that he had stolen a bicycle. Sanjay thereupon carried Vijay to his residence and Vijay once again narrated the said incident to his mother in the presence of Sanjay and from there, he was taken in a rickshaw to the Civil Hospital, Nasik. On the way to the hospital, Vijay became unconscious and on being admitted to the hospital, he was declared to have been

dead. Sanjay lodged complaint in writing at Bhadrakali Police Station where the offence was registered under Sections 302, 342, 143, 147 and 149 of the Indian Penal Code read with Section 37(1) read with Section 135 of the Bombay Police Act. On commencement of the investigation, all the six accused were arrested, their clothes were attached under the panchanama. The body of the deceased Vijay was subjected to the inquest panchanama as well as post-mortem examination. The medical officer opined that the death of Vijay was due to shock, intracranial haemorrhage and due to fracture of skull. After carrying out the spot panchanama, the articles at the spot of the incident including the blood scrapping were collected from the scene of offence. The iron pipe was recovered at the instance of the accused No.1 Sham Kankaria. Coir cord and pieces of wooden pegs having blood stains were attached from the spot of the incident. The seized articles were sent for examination by the Chemical Analyser. The blood sample of the deceased was also collected and sent for medical analysis along with the clothes on the body of the deceased. On conclusion of the investigation, all the six accused were chargesheeted. They were tried before the learned Additional Sessions Judge and were convicted by the impugned judgment and order, as stated above.

4. The accused persons being dissatisfied of the

conviction claiming to be innocent have filed their respective appeals. On the other hand, the State being dissatisfied with the acquittal of the accused under Section 302 read with 34 of the Indian Penal Code as well as being dissatisfied on the point of quantum of sentence imposed upon the accused has filed the appeals against the acquittal of the accused as well as for enhancement of the sentence.

5. The prosecution examined the complainant Sanjay Kedare (P.W.9), brother of the deceased as well as Hirabai Kedare (P.W.10) mother of the deceased so also Rameshchandra Chotelal Kesharwani (P.W.1) the Manager of New Bharati Lodge and Mushtaq Kagdi (P.W.3) the owner of the said Lodge, and Narendrasingh Rajput (P.W.4) the occupant of the said Lodge wherein the incidence in question occurred. The prosecution also examined the doctor being P.W.2- Dr.Ravindra Ashtaputre, who had performed post-mortem examination of the dead body of Vijay. One Isac Musa Shaikh (P.W.5), Kishor Somappa Devadiga (P.W.6), Shaikh Nazir (P.W.7) and Suresh Sonu Balal (P.W.8) were examined as the panchas. Shantaram Panditrao Gaikwad, PSI as P.W.11 and Surendra Bapu Patil, P.I. as P.W.12, were also examined being Investigation Officers.

6. The first information report (Exhibit-57) came to be lodged by Sanjay (P.W.9) at Bhadrakali Police Station, Nashik, at about 3.00 a.m. to 3.15 a.m. of

14th January, 1992. The witness Sanjay in his testimony stated that he returned to his house on 13th January, 1992 at about 9.00 p.m. but he did not find his younger brother at home. On that day, the father had already left the house in the morning and he had also not returned till late night. After having dinner at about 9.30 p.m., the witness went to sleep, and at about 1.45 a.m. or 2.00 a.m., somebody knocked the door of his house and, therefore, the witness Sanjay and his mother Hirabai got up and the witness Sanjay opened the door of the house whereupon he saw the accused No.5 Khandu; Khandu informed the witness that Vijay was assaulted and was lying somewhere. His mother asked Sanjay to go and find out Vijay and accordingly the witness Sanjay left the house along with Khandu. The accused Khandu took the witness to Bharati Nivas Lodge situated on Thakure Road. The accused Khandu knocked the door of the Lodge and a boy opened the door from inside, whereupon the accused Khandu took Sanjay on the top floor of the Lodge where he saw his brother Vijay lying on the floor being tied to a cot. The hands and legs of Vijay were also tied. Vijay was asking for water. There was blood on the person of his brother and he had injury on his head. The witness untied the hands and legs of his brother and asked him as to who had assaulted him and for what purpose. Vijay told the witness Sanjay that he was assaulted by Sham Kankaria, Raju Pathan, Balya Bhandewala, Sanjay Ranbhise, Khandu Abhang and Raja

Bhavar on an allegation of theft of a bicycle. Vijay also told Sanjay that he was assaulted with a stick and pipe, and he was given blows on his head with the pipe and was given blows on his back and chest with a stick. Vijay further asked the witness to take him with the witness whereupon Vijay was brought downstairs and further to his house by the witness. Meanwhile, when Vijay was brought to the ground floor of the Lodge, the accused Khandu left the place. The mother of the witness asked Vijay as to who had assaulted him to which, Vijay told his mother whatever he had told earlier to his brother Sanjay. The mother asked the witness to bring rickshaw to take his brother Vijay to the hospital. Sanjay brought the rickshaw and took Vijay to the hospital. On the way to hospital, Vijay became unconscious and the Doctor, who attended Vijay for about 10 minutes in the hospital, declared Vijay to have been dead. It was at about 2.45 a.m. The witness immediately went to the Bhadrakali Police Station and lodged the complaint (Exhibit-57). At the time of the post-mortem and the inquest panchanama, the witness also identified the dead body of his brother Vijay. In the cross-examination, the witness stated that the boy who opened the door of the Lodge did not come upstairs with the witness when he had gone to the Lodge along with Khandu, and, at that time, no other occupant was seen in the Lodge. The boy who had opened the door was in the office of the Lodge. The witness also

stated that he had seen the blood lying at the spot and it had spread over an area having radius of 2 to 3 feet. The witness also stated that the person from the Lodge did not tell him as to what had happened to his brother nor he had made any inquiry with him.

7. Hirabai (P.W.10), the mother of the deceased

in her testimony has stated that Vijay was at home on 13th January, 1992 upto 8.00 p.m., and after his meal, while he was playing with other children in the house, Khandu and Sanjay Ranbhise came to their house and asked for Bablu i.e. Vijay, whereupon, she called Bablu i.e. Vijay and when Bablu alias Vijay came out, Sanjay Ranbhise put his hand around the neck of Bablu and called him for a walk along with them. Thereafter, Bablu went along with Sanjay Ranbhise and Khandu. Sanjay Kedare (P.W.9) came to the house at about 9.00 p.m. and after having his meal, he went to sleep, so also the witness Hirabai went to sleep around 11 p.m. She has further stated that her husband who had left for work in the morning had not returned till late night. At about 1.45 or 2 O'clock in the night between 13th and 14th January, 1992, somebody knocked the door, and, therefore, herself and Sanjay got up and Sanjay opened the door and they saw Khandu in front of the said door of the house. Khandu informed Sanjay that his brother was assaulted and was lying somewhere. She thereupon asked Sanjay to leave immediately to get his brother. Sanjay accompanied

Khandu. Sanjay thereafter brought Bablu to the house in the injured condition. She noticed head injury on Vijay and linear marks on his chest, back and stomach. She inquired with Vijay, as he had gone with Sanjay Ranbhise and Khandu, as to who had assaulted him and Vijay told her that he was taken to the Lodge by Sanjay Ranbhise and Khandu and there he was beaten after having tied his hands and legs. He also told her that he was assaulted by Sanjay Ranbhise, Sham Kankaria, Khandu and their associates with bar, pipe and sticks on the allegation that he had stolen a bicycle. Vijay asked for water and after having water, Hirabai-the witness wrapped a bed sheet around his head. She asked Sanjay to get rickshaw forthwith. At that time, Vijay was feeling giddiness. Sanjay brought rickshaw and the witness herself, her son Sanjay and her daughter took Vijay to the civil hospital in the said rickshaw. On the way to the civil hospital, Vijay became unconscious and when they reached the hospital, he was examined by the doctor and the doctor had declared him to have been dead. Sanjay went to the police station to lodge a complaint. She identified the clothes of her son which were on his person at the time when he had left the house with Khandu and Ranbhise. In the cross-examination, she stated that one Balasaheb Aher accompanied Sanjay to bring rickshaw but he did not come with them to the hospital.

8. Rameshchandra Chotelal Kesharwani (P.W.1), who was looking after the management of New Bharati Lodge, has stated in his testimony that the said Lodge is owned by Mushtaq Shaikh Tagadi, and one Narendrasingh Rajput (P.W.4) was living in the Lodge on monthly basis since two months prior to the date of incident. Bharati Lodge has three storeyed building and it has medical shop on the 2nd floor, and the 3rd floor was not being used. On that day, when Narendrasingh Rajput left the Lodge for having his dinner, he kept the key in the window of the office of the Lodge. The witness was told by Narendrasingh that Sham Kankaria and his friends had taken one boy to third floor. He heard the voice of Sham Kankaria on the 2nd floor and also heard the sound of somebody weeping. As he was afraid of Sham Kankaria, he did not go upstairs. When Mushtaq Shaikh came to the Lodge, he was informed by the witness that Sham Kankaria and his friends had taken somebody to upstairs. At that time, the witness heard noise of weeping and giving abuses. Thereupon, Mushtaq followed by the witness Rameshchandra went to the 3rd floor and knocked the door of the room. The door was opened by Khandu whom the witness identified. He stated that he knew the accused Khandu one or two months prior to the date of incident. Mushtaq entered the Lodge and the witness stood on the threshold of the door. He saw the accused Sham Kankaria and Raju Pathan standing inside the Lodge and one boy was lying on the floor with his

hands and legs tied. The accused Sham Kankaria was having an iron pipe in his hand and accused Raju Pathan was having a wooden stick (Khuti) of the length of 1 and 1/2 feet in his hand. Accused Sanjay Ranbhise, Khandu Abhang and one Balya Tambat were standing and were alleging that a cycle was stolen. Mushtaq thereupon asked the witness to get water. The witness brought the water and gave it to the boy. Mushtaq also asked them to release the boy, and after some time, Mushtaq along with the witness came down from the 2nd floor. Mushtaq told all the persons to leave and asked to close the door of the Lodge after all of them leave the Lodge. Mushtaq left the Lodge after giving necessary instructions to the witness. He has further stated that when Mushtaq had come downstairs, he was followed by five persons but those five persons again went to the 3rd floor after Mushtaq left the Lodge. The witness heard the noise of beating and weeping after Mushtaq left the Lodge. The witness heard the voice of the accused Sham Kankaria and the sound of beating and weeping. Therefore, late in the night, the witness heard somebody knocking at the door of the Lodge on the ground floor. The witness then went to the ground floor and opened the door and he saw Khandu Abhang and one more person with him, however he did not know that person who had accompanied Khandu to 3rd floor on that occasion at late night hours. They brought the injured boy to the ground floor. The witness stated that the boy was

walking and was having blood on the back side of his shirt. He further stated that the blood was oozing from the backside of his head. The police officer came to the Lodge at about 3.00 a.m. in the night. He has also identified Article No.17 the iron pipe, as the one which was in the hand of Sham Kankaria and Article 12 comprising of three pieces of stick, as the one which was in the hand of Raju Pathan.

9. Dr.Ravindra Ashtaputre (P.W.2), who conducted the post-mortem on the dead body of Vijay, on external examination of the dead body, found the following injuries.

- "1. Contusion on left temporal region 2"x 2".
2. Contused lacerated wound on vault near occipital region 1" x 1/2" into bone deep.
3. Abrasions 5 in number circular 1/4" on face right side.
4. Swelling over left elbow 2" x 2".
5. Imprint abrasion encircling left wrist posterior aspect 1/2" x 2 1/2".

6. Small abrasion on right wrist 1/2" x 1" on anterior aspect.
7. Contusion on left upper arm below deltoid 2" x 3/4".
8. Contusion on back left side 3" x 3/4" below scapula.
9. Abrasion on right upper arm 1/2" x 1".
10. Swelling with abrasion on right elbow 2" x 1".
11. Abrasions 2 in number on right forearm.
12. Contusion on both scapulae. Size 7" x 1" on left and 8" x 1" on right scapula.
13. Multiple abrasions on buttock.

The other injuries discovered by external examination are palpation as fracturel.

1. Fracture of right elbow.

2. Fracture of left wrist."

In respect of the injuries noticed on the body of the deceased, the Doctor in his testimony has stated as follows :

"On internal examination I found Haematoma below both injuries on scalp, mentioned at Sr.Nos.1 and 2 in column No.17, of postmortem note. I also noticed fracture of vault, in front of occipital region. 1" in Star Shape. Fracture of vault was corresponding to injury No.2 in Column No.17. On examination of the brain, I found intracranial haemorrhage and coverings of the brain were torn. Intracranial haemorrhage in the brain was on account of injury No.2 in column No.17. The brain coverings were torn because of fracture of vault. According to me, the death was caused because of shock due to intracranial haemorrhage, due to fracture of skull. Exh.42 is the postmortem report prepared by me after my examination and it bears my signature. Injury i.e. fracture of vault in front of occipital region

corresponding to injury No.2 in column No.17 was sufficient in the ordinary course of nature to cause the death of a person. The injuries i.e. contusion on left temporal region, contused lacerated wound on vault, swell ing over left elbow, contusion on left upper arm, contusion on back, contusion on both scapule, in Column No.17 can be caused by hard and blunt object. The fracture injury of vault can be caused by the iron pipe, article No.17 shown to me in the court. Contusion on left upper arm noticed in this case, can be caused by article No.17. Contusions noticed in this case on both scapule can be caused by the stick (Khunti) Article No.12 now shown to me in the court, Imprint abrasion encircling left wrist and right wrist can be caused if the hands are tied on the wrist region with the coir cot, Article No.11 shown to me in the court. If the wrists are tied with cot tightly it cannot cause fracture injury. I collected blood samplex of the deceased at the time of postmortem examination. Sample was sent for chemical analysis. Exh.43 is

the C.A. report, in respect of blood sample of the deceased, addressed to Medical Officer civil hospital Nashik."

In the cross-examination, the doctor stated that the injury contused lacerated wound on vault described by him in Column No.17 and fracture of right elbow and fracture of left wrist mentioned in my P.M.note, could have been caused due to fall. So also the injury mentioned at Sr.No.1 in Column No.17 i.e. contusion on left temporal region could have been caused due to fall. He has further clarified that the star shape shown by him regarding the skull injury disclosed that it was depressed fracture. The doctor has also opined that if a person is hit on his head with an iron pipe like Article No.17 then it could cause depressed fracture. He has further stated in his cross-examination that if a person losses half litre of blood from his body then it could stop blood supply to the brain, and in the case of Vijay, the cause of death was due to complete loss of blood from the heart and it was as a result of head injury suffered by Vijay. The doctor has also clarified that the blood from the body of the deceased was drained out through the head injury while the remaining blood of about 4 or 4 and 1/2 litres had not gone out of the body. The doctor has also opined that if the death resulting from the loss of blood from the heart could also be

called as the death due to shock.

10. Mushtaq Latif Kagdi (P.W.3), after identifying all the six accused, has stated in his testimony that on the day of incidence, at about 10.30 p.m., when he came to the Lodge while he was making inquiry with Rameshchandra (P.W.1) as to whether any new passenger had come, he heard the noise of shouting and abuses from the upper floor of the Lodge. On inquiry with Rameshchandra (P.W.1), the latter told Mushtaq that he was informed by Narendrasingh Rajput (P.W.4) that Sham Kankaria and his 4 to 5 friends had taken one small boy to upstairs. Thereupon, Mushtaq went upstairs followed by Rameshchandra and knocked the door of the room and the accused Khandu opened the same. When the witness entered the room, he saw one boy, aged about 17 to 18 years, lying on the floor near the cot with his hands and legs tied. The witness saw Sham Kankaria standing by the side of another accused Raju Pathan, and they were armed with an iron pipe and a wooden peg in their hands respectively. The accused Raju Pathan had kept one of his feet on the legs of the boy who was lying on the floor. The witness Mushtaq in his testimony has further stated that when he entered the room, he saw accused Sham Kankaria assaulting the boy with the iron pipe and the accused Raju Pathan assaulting him with wooden peg, and both the accused in his presence gave blows on the legs and hands of the boy, and at that

time, the said boy was shouting. He has further stated that the accused Sham and Raju Pathan were assaulting the boy at the instigation by the four other accused on the ground that the boy had stolen a bicycle. He told Sham Kankaria not to beat the boy and the witness released the hands of the boy after untying the cord. The boy asked for water and the witness instructed Rameshchandra (P.W.1) to get the water for the boy. Accordingly, the boy was served with water. He also saw the boy bleeding through left nostril. After requesting Sham Kankaria not to assault the boy and to release him, the witness left the place leaving Rameshchandra in the Lodge. Before leaving the Lodge, he told Rameshchandra that the accused Sham Kankaria and his friends would be leaving the room. He further stated that he came to know about the death of the said boy at about 5 to 5.15 a.m. when he was awoken by his mother on account of police having come to his residence.

11. Narendrasingh Rajput (P.W.4) in his testimony has stated that Sham Kankaria and 4 and 5 persons came to the Lodge at about 8.30 p.m. on 13th January, 1992. One boy of aged 17 to 18 years also came with them. Sham and other persons straightaway went to the upper floor of the Lodge. He left the Lodge for dinner by entrusting the key of the Lodge to Rameshchandra (Chota Ramesh) at about 9.30 p.m. and returned to the lodge after midnight, and when he got

up on the next day at about 5.00 to 5.30 a.m., he noticed the presence of the police personnels in the Lodge. He left for his work at about 7 O'clock. He has also stated that he knew Sham Kankaria for over 1 and 1/2 months prior to the said incident as Sham used to visit the lodge. He also identified the other accused.

12. Isac Musa Shaikh (P.W.5) is a Panch for the scene of offence panchanama. He has confirmed recording of panchanama as well as the proceedings in respect thereof including the things attached in the course of panchanama.

13. Kishor Samappa Devadiga (P.W.6) is a Panch for arrest of the accused as well as the attachment of the blood stained clothes from the accused on 14th January, 1992. He has confirmed the arrest and the attachment of the clothes and proceedings in relation to the panchanama in respect thereof as well as panchanama itself.

14. Shaikh Nazir (P.W.7) is a Panch for inquest panchanama and he has confirmed the injuries on the deceased body which were seen by the panchas in the course of recording of panchanamas and has confirmed the same during the course of examination.

15. Suresh Sonu Balal (P.W.8) is a Panch for the

discovery of pipe, Article 17, and also identified the same to be the one which was recovered at the instance of the accused Sham Kankaria. He has confirmed the proceedings in relation to the recovery and the panchanama in respect thereof.

16. Shantaram Panditrao Gaikwad, P.S.I. (P.W.11)

has confirmed the first information report (Exhibit - 57) as also the arrest panchanama, inquest panchanama and the police yadi (Exhibit 60), while Surendra Patil (P.W.12) has narrated about the investigation being handed over to him by Shantaram Gaikwad. He has also produced on record the Chemical Analyser's Report (Exhibit 64) along with the forwarding letter (Exhibit 63) by the police to the Chemical Analyser.

17. In terms of the Chemical Analyser's Report,

the clothes attached from the accused disclose blood stains at various spots thereon. There was also blood detected on the clothes of the deceased, iron pipe, wooden pegs and the clay attached from the scene of offence, and the blood was found to be human blood and it was found to be of "O" group.

18. The learned Additional Sessions Judge referring to the evidence on record, has held that the direct evidence through the eye witness and other circumstantial evidence adduced by the prosecution clearly proves that the accused No.3 Sanjay and the

accused No.5 Khandu took the deceased Vijay to Bharti Lodge and thereafter the accused No.1 Sham Kankaria gave blows on the person of the deceased Vijay with iron pipe (Article 17) causing multiple injuries on the person of deceased Vijay including the one on occipital region and also established the fact that the accused Raju used the wooden peg (Article 12) for assaulting the deceased Vijay. He has also held that the testimony of Hirabai (P.W.10) establishes that the accused No.3 Sanjay and Accused No.5 Khandu visited her residence on 13th January, 1992 at about 8.00 p.m. and they took away the deceased Vijay with them. Further testimony of Sanjay (P.W.9) and Rameshchandra (P.W.1) establishes that the complainant Sanjay went to Bharti Lodge along with the accused No.5 Khandu and brought the deceased Vijay from the top floor of the Lodge in injured condition and then he took Vijay to his house before being taken to the civil hospital. Based on the testimony of Sanjay (P.W.9) and Rameshchandra (P.W.1) and Mushtaq (P.W.3) as well as Narendrasingh (P.W.4), the learned Additional Sessions Judge has held that the deceased was assaulted by all the six accused on the charge of bicycle theft and caused multiple injuries on the person of the deceased including fatal injuries. However, at the same time, the learned Additional Sessions Judge has held that the evidence does not indicate that the accused persons including the accused No.1 Sham Kankaria had any intention to kill the deceased Vijay though the

knowledge can be attributed to the accused No.1 Sham Kankaria that he was likely to cause death of Vijay when he gave blow on the vital part of the body of Vijay with the iron pipe. With that, the accused No.1 has been held guilty of offence punishable under Section 304(II) of the Indian Penal Code. As regards other accused, it has been held that they along with the accused No.1, by participating in the commission of the crime, intended to inflict grievous hurt on the body of the deceased with a view to extract confession regarding the bicycle theft, and in the course, they voluntarily caused grievous injuries to deceased Vijay, and, therefore, have been held guilty of the offence punishable under Section 325 read with 34 of Indian Penal Code along with the accused No.1 Sham Kankaria.

19. It is well settled that in a case where the prosecution is able to establish the dying declaration by the deceased and the same is found not only to be trustworthy but is also corroborated by the evidence on record, then there remains no scope to blame the prosecution about failure to bring on record the cogent evidence in support of the charges levelled against the accused therein. A dying declaration, it was held in **Tapinder Singh vs. State of Punjab & Anr.**, reported in AIR 1970 SC 1566, is a statement by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in

his death and it becomes relevant under Section 32(1) of the Indian Evidence Act in a case in which the cause of that person's death comes in question. It was further ruled therein that a dying declaration is admitted in evidence by way of an exception to the general rule against the admissibility of hearsay evidence, on the principle of necessity. Further in **Dalbir Singh & Ors. v. State of Punjab**, reported in AIR 1987 SC 1328, it was held that where a person gave a dying declaration a short time before his death when he was injured and lying in a precarious condition shortly after assault, such a dying declaration could not be discarded merely on the ground that it did not give precise description of all the instruments of offence and also the precise description in the manner in which the injuries were inflicted as well as that it was not expected of a person in such a physical and also mental state that he should in a very candid manner describe each of the instruments of the offence and the manner in which the injuries were inflicted and that it was more so, when the dying declaration clearly mentioned all the accused persons and there was no doubt about their identity. Then in **Panchdeo Singh v. State of Bihar**, reported in 2002 AIR SCW 88, it was held by the Apex Court that the dying declaration alluring confidence of the Court would be a sufficient piece of evidence to sustain conviction. There is no format as such of dying declaration neither the declaration need be of any longish nature

and neatly structured, ruled the Apex Court. In the case in hand, it is the case of the prosecution that the deceased, before being taken to the civil hospital, was conscious and named to his brother Sanjay (P.W.9) as well as his mother Hirabai (P.W.10) the six accused as being his assailants and he also told them that he was confined to one place at the said Lodge with his hands and legs tied and further that he was tied to a cot and was assaulted by an iron pipe and wooden peg. Indeed, the testimonies of Sanjay (P.W.9) and Hirabai (P.W.10) read with the testimonies of Rameshchandra (P.W.1) and Mushtaq (P.W.3) clearly corroborate the said statement of the deceased prior to his death, to Sanjay (P.W.9) and Hirabai (P.W.10). The statement clearly related to the circumstances which were faced by Vijay immediately prior to and in the course of assault on him and immediately subsequent thereto. In other words, the said statement of the deceased related to the cause of his death. Being so, it has to be considered as the oral dying declaration by Vijay to those witnesses. Sanjay (P.W.9), the brother of the deceased Vijay, has clearly stated in his testimony that when he was taken to Bharti Lodge by the accused No.5 Khandu, after being informed by the said accused that Vijay was lying somewhere on being assaulted, Sanjay (P.W.9) was told by the deceased in the said Lodge that he was given blows on his head with the pipe and on his back and chest with a stick and he was

assaulted by all the six accused. He had even named the accused persons. The fact that the deceased made similar narration at his house has been confirmed by his mother Hirabai (P.W.10). Hirabai has stated in her testimony that the deceased told her in the presence of Sanjay (P.W.9) that he was assaulted by the accused with the pipe and stick. The testimony of P.W.9 and P.W.10, Sanjay and Hirabai respectively, is strengthen by the testimony of P.W.3 Mushtaq. The fact that the deceased was assaulted by the accused No.1 with the pipe (Article 17) has also been narrated by Mushtaq (P.W.3) in his deposition. In fact, Mushtaq (P.W.3), in his testimony, has categorically stated that when he entered the room he saw the accused Sham Kankaria assaulting the deceased Vijay with the iron pipe and the accused Raju Pathan was assaulting him with the wooden peg. He has also stated that the said two accused also gave blows to the deceased on his legs and hands in his presence. The boy, at that time, was shouting and other four accused were asking Sham Kankaria and Raju Pathan to assault the boy as he had stolen a bicycle and both the accused, viz. Sham Kankaria and Raju Pathan, were assaulting the boy on the instigation by other four accused. The fact that the witness Mushtaq had occasion to see the said incidence has also been further corroborated by the testimony of Rameshchandra (P.W.1) as the witness had accompanied Mushtaq till the entrance of the room wherein the boy was being

assaulted by the accused, and further had served water to the deceased on being asked to do so by Mushtaq (P.W.3). The witness Rameshchandra (P.W.1) in his testimony has clearly stated that the accused Sham Kankaria was having the iron pipe in his hand and Raju Pathan was having wooden stick in his hand and further that all other four accused were accusing the boy to have stolen a bicycle. The testimony of Sanjay (P.W.9) and Hirabai (P.W.10) on the point of dying declaration by the deceased Vijay has remained unshaken. On the contrary, the cross-examination of Sanjay (P.W.9) strengthen the case of the prosecution on the point that Sanjay had been in the Bharti Lodge on being informed by the accused Khandu that his brother Vijay was lying somewhere after being assaulted and with that information, the witness was taken to the said Lodge, none other than the accused No.5 Khandu and further that Sanjay brought his brother to his residence and from there, he was taken to the civil hospital.

20. The fact that the deceased Vijay was wrongfully confined after his hands and legs were tied and he was tied to a cot on the top floor of Bharti Lodge has been duly established by the prosecution through the testimony of Sanjay (P.W.9) as well as of Rameshchandra (P.W.1) and Mushtaq (P.W.3). Mushtaq (P.W.3) in his testimony has stated that when he entered the room, he saw a boy, aged 17 to 18 years,

lying on the floor near the cot with his hands and legs tied. Sanjay, P.W.9, the brother of the deceased Vijay, in his testimony has also stated that when he accompanied the accused Khandu to the said Lodge, he saw his brother lying on the floor having been tied to the cot and his hands and legs were also tied. Both these testimonies of the witnesses have remained unshaken throughout therein.

21. The fact that the accused Khandu had been to the house of the deceased to inform Sanjay (P.W.9) that Vijay was lying injured and took him to the Bharti Lodge has also been established by the testimony of Sanjay (P.W.9), his mother Hirabai (P.W.10) and Rameshchandra (P.W.1). Apart from the clear statement by Sanjay and Hirabai (P.W.9) and (P.W.10) respectively, as regards Khandu having approached and knocked the door of the house at about 1.45 a.m., and having informed about Vijay to have been assaulted and was lying somewhere, the fact that Khandu took Sanjay to the said Lodge and knocked the door of the said Lodge late in the night has been established by the testimony of Rameshchandra (P.W.1). The said witness has stated in his deposition that, late in the night, he heard somebody knocking the door of the lodge of the ground floor and he went to the ground floor and opened the door and he found the accused Khandu along with one more person with him and both of them went to the top floor and brought the

injured boy, who was kept confined on the top floor, to the ground floor. He has also deposed that the boy was walking "in a condition of giddiness" and was having "blood on the backside of his shirt and the blood was oozing from the backside of the head."

22. The guilt of the accused is clearly established from the chain of events established by cogent evidence brought on record, which can be conveniently summarized as under : -

(a) Taking undue advantage of friendship, the deceased Vijay was called from his residence by Sanjay, Accused No.3 and Khandu, Accused No.5, under the pretext of going for a walk. This is established by the testimony of mother of Vijay viz. Hirabai (P.W.10) and the brother of Vijay viz. Sanjay (P.W.9).

(b) The deceased Vijay was taken to Bharti Lodge and his hands and legs were tied and he was made to lie on the floor and thereupon, he was kept tied to the cot in helpless condition. This is established by the testimony of Rameshchandra (P.W.1), Mushtaq (P.W.3) and Narendrasingh (P.W.4).

(c) All the accused were present on the top floor in the room where the deceased Vijay was wrongfully confined. This has been established by the testimony of Rameshchandra (P.W.1), Mushtaq (P.W.3), Narendrasingh (P.W.4), Sanjay (P.W.9).

(d) At the relevant time and place, Shri Sham Kankaria, Accused No.1, was having metal pipe in his hand while Raju, Accused No.2 was having wooden peg in his hand. This has been established by the testimony of Rameshchandra (P.W.1) and Mushtaq (P.W.3).

(e) The deceased Vijay was assaulted on his head and other parts of the body by the said pipe by the accused No.1. This has been established by the testimony of Mushtaq (P.W.3) and of Rameshchandra (P.W.1), and by the dying declaration of Vijay to Sanjay (P.W.9) and Hirabai (P.W.10), and the medical evidence by Dr.Ashtaputre (P.W.2) and the discovery of the iron

pipe has been proved by the testimony of Suresh Balal (P.W.8) further supported by Chemical Analyser's Report.

(f) The deceased Vijay was assaulted by wooden peg on his chest, hands and legs by Raju, the accused No.2. This has been established by the testimony of Mushtaq (P.W.3) and of Rameshchandra (P.W.1) and the dying declaration of Vijay to Sanjay (P.W.9) and Hirabai (P.W.10) and medical evidence by P.W.2 Ashtaputre read with the Chemical Analyser's report.

(g) All the remaining four accused also participated in the offence by asking the accused Nos.1 and 2 to assault the deceased. This has been established by the testimony of Rameshchandra (P.W.1) and Mushtaq (P.W.3), and the dying declaration.

(h) Throughout the assault and even thereafter, the deceased Vijay was lying in an injured condition with his hands and legs tied and further he was tied to a cot on the top floor of

Bharti Lodge. This is established by the testimony of Rameshchandra (P.W.1), Mushtaq (P.W.3) and Sanjay (P.W.9) read with dying declaration of Vijay to Sanjay (P.W.9) and Hirabai (P.W.10).

(i) The information regarding Vijay being lying in injured condition at Bharati Lodge was given to Sanjay (P.W.9) and Hirabai (P.W.10) by the accused No.5 Khandu and he took Sanjay to the said Lodge where Vijay was lying in injured condition. This has been established through the testimony of P.W.9 Sanjay and P.W.10 Hirabai as well as P.W.1 Rameshchandra.

(j) The blood stained clothes, which the accused were wearing at the time of commission of offence, were attached from the accused. This is established from the testimony of the pancha (P.W.6) Kishor Devadiga, and Investigation Officer (P.W.12) read with Chemical Analyser's report.

(k) The blood of the deceased Vijay was of

"O" group and the blood found on the pipe and earth mixed with blood taken from the scene of offence as well as on some of the clothes on the accused persons was also of "O" group is established from the report of the Chemical Analyser read with the testimony of the Investigation Officer Surendra Patil (P.W.12), and that of the Pancha.

(l) The deceased Vijay made a statement regarding the cause of his death to his brother Sanjay (P.W.9) and his mother Hirabai (P.W.10). This is established from the testimony of P.W.9 Sanjay and P.W.10 Hirabai.

(m) As regards the motive, the same has been established through the dying declaration of the deceased Vijay and the testimony in that regard of Sanjay (P.W.9), his mother Hirabai (P.W.10) as also the testimony of Rameshchandra (P.W.1) and Mushtaq (P.W.3).

(n) The injury sustained by the deceased on his head could have been caused by

the iron pipe (Article 17) and was sufficient in the ordinary course to cause death of the person has been established by the testimony of Dr.Ravindra Ashtaputre (P.W.2) and the Chemical Analyser's report.

(o) The injuries found on the hands and legs of the deceased were also caused on account of assault by the use of pipe as well as wooden peg is also established by the testimony of Dr.Ravindra Ashtaputre (P.W.2) along with the Chemical Analyser's report, and the Pancha along with the discovery panchanama.

(p) The fact that the crime was immediately reported to the police is established by the F.I.R. (Exhibit - 57) read with the testimony of Sanjay (P.W.9) and PSI Shantaram (P.W.11).

(q) The common intention behind the offence is disclosed from the conduct of the accused prior to, at the time of and subsequent to the commission of the act of assault as well as the manner and the place where the offence

was committed.

23. The analysis of the entire evidence on record

in proper perspective therefore discloses that all the accused in furtherance of common intention to extract confession regarding the alleged theft of bicycle and further to punish him on such confession, sent Sanjay and Khandu, accused No.3 and accused No.5 respectively, to the residence of Vijay and called him along with them on the pretext of going for a walk and brought him to Bharti Lodge and on reaching Bharti Lodge, all the accused took him to the top floor, tied his hands and legs and further tied him to a cot and made him to lie supine and helpless on the floor and thereafter sought to obtain confession regarding the alleged theft of bicycle and in the process ruthlessly assaulted him with iron pipe and wooden peg in furtherance of such common intention and with the knowledge to cause bodily injury which was likely to cause his death. The accused No.1 Sham Kankaria assaulted Vijay on his head with the iron pipe (Article 17) as also on the other parts of the body including the hands and legs, and the accused No.2 Raju Pathan assaulted him with sticks on his person, particularly on the hands and legs, and all the remaining four accused participated in the said assault by asking both the accused, viz. Sham Kankaria and Raju Pathan, to assault Vijay with the iron pipe and wooden stick. Further they left Vijay

in the injured condition confined to the said place, helpless and absolutely unattended in any manner, knowing well that he would remain so, and informed his brother that Vijay was lying in the injured condition somewhere, only after about three hours from the time of assault, and further arranged to take his brother to the place where Vijay was lying in that condition.

24. It is sought to be contended on behalf of the accused that the prosecution has failed to establish the motive behind the crime. The trial Court has also arrived at the similar finding. The evidence on record however discloses to the contrary, apart from the fact that the absence of motive is irrelevant when the evidence on record establishes crime committed by the accused. In the case in hand, the evidence on record discloses that the whole episode was well planned and it was to extract the confession about the alleged theft of bicycle and to punish Vijay on such confession. Otherwise, there was no need for the accused to call Vijay on the pretext of going for a walk and then to take him to the top floor of Bharati Lodge where normally, as per the testimony of the Manager and the occupant of the hotel, no occupants were found, and then to confine Vijay to the said place in such a manner that he could neither rescue himself nor even run away from the clutch of the accused, nor he could even save himself in any manner from the brutal attack on him by the accused persons.

It is to be noted that the accused were six in number, two of them being armed with iron pipe and wooden peg while the deceased had his hands and legs tied and further he was tied to a cot and made to lie on the floor in supine and helpless condition. It is pertinent to note that the deceased was left in that condition, seriously injured including on the vital part on his body, for about three hours without any help and totally in an unattended situation. Can it be said to be without any motive ? Without any intention ? Without any knowledge? Answers to all

these questions are to be in negative.

25. It is sought to be contended that the weapons (Articles 17 and 12) cannot be said to be the dangerous weapons. In that connection, attention was sought to be drawn to the decision of the Apex Court in **Panchaiah & Ors. v. State of Karnataka**, reported in AIR 1994 SC 963. In **Panchaiah's case**, considering the existing enmity between two groups and the evidence being of the interested witnesses and therefore was required to be carefully scrutinized, it was held in the facts and circumstances of that case that only one injury was caused by cycle chain on the head of deceased and other injuries were only bruises and abrasions. As no other deadly weapons were used by the assailants, and only one injury was caused by the bicycle chain, it was held that the intention to cause death could not have been inferred but it did

disclose the knowledge and, therefore, conviction under Section 302 read with Section 34 was altered to one under Section 304 Part II read with Section 34 of Indian Penal Code. It is nowhere held therein that the bicycle chain is not a deadly weapon. What was observed in support of the decision to convict under Section 304 Part II instead of Section 302 read with Section 34 of Indian Penal Code was that "if really the intention of the assailants whoever they may be was to cause the death of deceased, they would have been armed with deadly weapons or would have inflicted more serious injuries". Obviously, the observation was to the effect that in case the assailants, who were present in number disclosed from the facts, would have been armed with the deadly weapons or would have inflicted more serious injuries on the deceased. In other words, if each of the members of the assailants' group would have intention to cause death of the said person, then at least all of them would have inflicted serious injuries to him. It was also observed by the Apex Court before arriving at the said finding that "the medical evidence thus shows that there is only one injury which was serious on the head and the other injuries were only bruised abrasions. If really as contended by the learned counsel for the State that the intention of the appellant was to cause death, they would have inflicted more serious injuries." That is not the case in hand. Besides, the manner and the place where the deceased in the case in hand was

assaulted clearly reveal the intention of the accused to cause bodily injuries sufficient to cause death, coupled with the conduct prior to and subsequent to the assault by the accused. The decision relied upon nowhere lays down any general proposition of law as regards what could be said to be a dangerous weapon. In fact, it is difficult to lay down any such general proposition of law as regards, what would be the dangerous weapon. It would, and have to depend upon, the various factors and each case will have to be decided on the basis of the facts and circumstances of the case. In a given case, even a small thing like pointed end of a ball pen could be a dangerous weapon when used to pierce in the eyes and ears.

26. It is sought to be contended on behalf of the accused No.2 Raju that the evidence on record does not disclose any overt act on his part that could have intended to cause death of or to cause grievous injury which could cause death of Vijay. According to the learned Advocate for the accused No.2 Raju, the evidence is merely regarding the assault on hands and legs with the help of wooden peg and that too of P.W.1 Rameshchandra which is not corroborated by any other witnesses. Being so, the evidence regarding the assault by the accused No.2 is to be held as unbelievable. The contention is totally devoid of substance. The testimony of P.W.1 in this regard is clear and has not been shaken in any manner in the

cross examination. Besides, it also finds support from the testimony of P.W.3 Mushtaq as well as from the dying declaration by the deceased Vijay. The fact that the P.W.1 had entered the room where the deceased was being assaulted has been clearly stated by the P.W.1 Rameshchandra as well as P.W.3 Mushtaq, while the latter was standing near the door of the said room and subsequently entered the room to serve water to Vijay. It is also confirmed by the deceased through his dying declaration that he was assaulted by the accused No.2 with wooden peg on his chest and other parts of his body. The fact that the accused No.2 was seen assaulting the deceased has been clearly stated by P.W.1 Rameshchandra. Once it is established that the P.W.1 was inside the room and had occasion to see the incident of assault and the cross-examination has not been able to make any dent in the testimony of P.W.1 in that regard, even in the absence of any corroboration, there would have been no difficulty in relying upon the statement of P.W.1 Rameshchandra in that regard.

27. As regards the contention that the overt act on the part of the accused No.2 is confined to assault on the hands and legs and did not disclose any intention to cause death of Vijay, his acts are to be considered along with the acts of the other accused and the incidence of assault is to be considered in totality which was carried out in furtherance of

common intention by all the accused besides that the knowledge of the assault being the vital part of the body was sufficient to cause death of Vijay.

28. In **Hari Singh & Anr. v. State of Rajasthan**, reported in AIR 1997 SC 1505, the Apex Court, after taking into consideration the facts and circumstances of the case and the finding that the High Court as well as the Trial Court has rightly disbelieved the defence version, has held that there was no clear evidence on record to show that the Appellant No.2 therein had caused a fatal injury, and therefore, the conviction of the appellant No.2 therein under Section 302 was not sustainable. However, it was held that his participation in the murderous assault on Babu along with the Appellant No.1 was proved beyond any doubt and, therefore, he was guilty of the offence punishable under Section 302 read with Section 34 of I.P.C. Apparently, the law on the point is well settled that even though an individual overt act may not be established which might have led to infliction of a fatal injury, if participation with common intention of such accused in assaulting the deceased by the co-accused is established, certainly the former can be convicted for the offence punishable under Section 302 read with Section 34 of Indian Penal Code.

29. The Apex Court in **Ajay Sharma v. State of Rajasthan**, reported in 1998 Cr.L.J. 4590, had altered

the conviction of the accused from 302 to 324 while holding that "from the averments in FIR as well as from the statement of P.W.1, it cannot be said that the appellant had shared common intention to kill the deceased. The appellant might not have known that Daljeet Singh was having a kripa under his stockings. The instigation was only 'to strike' and as such his conviction under Section 302 read with 34, IPC is not sustainable." Apparently that was a decision in a case where the accused Ajay Sharma, who stated to have instigated Daljeet to strike the deceased had no occasion to know that Daljeet had kripa under his stockings and it was mere instigation to strike at the deceased. That is not the case in the matter in hand. As already seen above, it was well planned that Vijay was required to be brought on the top floor of the hotel, and, therefore, Khandu Accused No.5 and Sanjay, the Accused No.3, were sent to the residence of Vijay and he was called under the pretext of going for a walk with them and he was taken to the said Lodge. All the accused knew the place well in advance and also had sufficient opportunity to know and they knew that the accused No.1 was carrying iron pipe and the Accused No.2 was carrying wooden peg in their hands at the relevant time. As already observed above, the deceased was confined to one place in helpless and unattended condition and, thereafter, he was assaulted in a brutal manner. The case in hand can by no stretch of imagination be considered to be one falling

under Section 324.

30. In **Suraj Bhan v. State of Haryana**, reported

in AIR 2003 SC 785, considering the fact that the accused had inflicted the blow on the deceased and the doctor had opined that the injury was caused in such a manner as to cause the death of the deceased, it was held that the accused must be attributed with the knowledge that when he used a lathi forcefully on the head of a person, he was likely to cause death of the said person and the prosecution had also proved that the accused had the intention to kill the deceased, and, therefore, the offence fell under Section 302 and not under Section 304 Part II of the Indian Penal Code.

31. It is sought to be contended that the

testimony of Sanjay (P.W.9) and Hirabai (P.W.10) is contradictory to each other on the relevant aspect of the matter and, in that regard, attention is drawn to that testimony relating to the fact pertaining to the manner in which Sanjay was brought to the house. While one testimony discloses that Vijay was brought to the house being lifted by Sanjay and other testimony discloses that he was brought by placing his one hand on the shoulder of Sanjay. It can hardly be said to be a discrepancy, and even if so considered, it is total irrelevant. Undoubtedly, Vijay was family member of both the witnesses and he was in seriously

injured condition. In those circumstances, the family members could have hardly noticed the manner in which Vijay was brought to the house, whether being lifted by Sanjay or giving him support of his shoulder. In any case, the discrepancy cannot be said to be either relevant or discrepancy is such that it could be sufficient to discard the testimonies of both the witnesses which are otherwise believable being consistent with the other materials on record in relation to the crime committed by the accused.

32. In **Krishnan & Anr. v. State represented by**

Inspector of Police, reported in (2003) 7 SCC 56, it was held that when ocular evidence is cogent, credible and trustworthy, minor variance, if any, with the medical evidence is not of any consequence and it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye witnesses' account which has to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant". It was further held that where the eyewitnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not to be accepted as conclusive. It was further ruled that the evidence must be tested for its inherent consistency and the inherent probability of the story. It was also held that the concept of probability and the degrees of it cannot obviously be expressed in terms

of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. It was further held that doubts would be called reasonable if they are free from a zest for abstract speculation and the law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over-emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense and it must grow out of the evidence in the case.

33. In **Sucha Singh & Anr. v. State of Punjab**,

reported in (2003) 7 SCC 643, it was held thus :-

"The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liars.
..... Falsity of a particular material witness or a material particular would not ruin it from the beginning to end. The aforesaid dictum is not a sound rule for the reason that one hardly

comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment...

.....

So even if a major portion of evidence is found to be deficient, in case residue is sufficient to prove the guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained."

34. Much was sought to be argued about the failure of the prosecution to examine Balasaheb Aher, who is said to have been present at the time when Vijay was brought to the house by Sanjay. One fails to understand as to in what way, the examination of Balasaheb Aher could have been of any help to the prosecution to establish the case. In case the accused wanted to examine the witness in their defence, nothing prevented them from examining the said witness. It is not quantity of the evidence but the quality of evidence which is material while considering the prosecution case. Non examination of irrelevant witness or even relevant witness would not be fatal to the prosecution case if the evidence already placed on record is sufficient to establish the guilt of the accused. The Apex Court in **Babu Ram & Anr. v. State of U.P.& Ors.**, reported in 2002 AIR SCW 3192 has clearly held that it is settled law that

non examination of any eye witness cannot be pressed into service like ritualistic formula for discarding the prosecution case with a stroke of pain and an effort should be made to appreciate the worth of such evidence as has been adduced. If the evidence coming from the mouth of the eye witnesses examined by the prosecution is found to be trustworthy and worth being relied upon so as to form safe basis of recording a finding of guilt of the accused persons then non examination of yet another witness who would have merely repeated the same story as has already been narrated by other reliable witnesses would not cause any dent or infirmity in the prosecution case. Indeed, it is well established that merely non examination of one witness to speak on the same point does not impair the prosecution case when another witness examined fully supports the prosecution case,

(vide "**Samsher Singh @ Shera v. State of Haryana**,

reported in 2002 AIR SCW 4070.")

35. The Apex Court in **Bodh Raj alias Bodha & Ors.**

v. State of Jammu and Kashmir, reported in AIR 2002 SC 3164, has clearly ruled that for a crime to be proved, it is not necessary that the crime must be seen to have been committed or that must, in all circumstances be proved by direct ocular evidence by examining before the court those persons who had seen its commission, but the offence can be proved by circumstantial evidence also. It is held that the

principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. To put it differently circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.

36. In **State of Haryana v. Bhagirath & Ors.**,

reported in (1999) 5 SCC 96, it was held that the pristine doctrine of benefit of doubt can be invoked when there is reasonable doubt regarding the guilt of the accused and it is the reasonable doubt which a conscientious judicial mind entertains on a conspectus of the entire evidence that the accused might not have committed the offence, which affords the benefit to the accused at the end of the criminal trial. Benefit of doubt is not a legal dosage to be administered at every segment of the evidence, but an advantage to be afforded to the accused at the final end after consideration of the entire evidence, if the Judge conscientiously and reasonably entertains doubt regarding the guilt of the accused.

37. As regards the contention relating to absence

of common intention, it is to be noted that it is well established law that there cannot be any direct

evidence in respect of the common intention on the part of the accused persons and the same has to be gathered from the circumstances of the case. In fact, the Apex Court in **Krishnan and Anr.(supra)**, while dealing with the concept of common intention, held thus:

"Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all as if he had done them himself; for "that act" and "the act" in the latter part of the section must include the whole section covered by a "criminal act" in the first part, because they refer to it. Constructive liability under Section 34 may arise in three well-defined cases. A person may be constructively liable for an offence which he did not actually commit by reason of:

(1) the common intention of all to commit such an offence (Section 34);

(2) his being a member of a conspiracy to commit such an offence (Section 120-A);

(3) his being a member of an unlawful assembly, the members whereof knew that an

offence was likely to be committed (Section 149). Section 34 is framed to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them. The reason why all are deemed guilty in such cases is that the presence of accomplices gives encouragement, support and protection to the person actually committing the act. The provision embodies the commonsense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually."

38. Undoubtedly, the existence of a common intention amongst the participants in a crime is absolutely essential for application of Section 34. However, that does not mean that the acts of the several or of all the persons accused of commission of an offence jointly must be the same or identical in nature, but rather the acts different in character must have been actuated by one and the same common intention in order to attract the provision of law. Seldom there can be a direct proof of common intention. In fact, such intention can only be inferred from the circumstances appearing from the proved facts and the materials on record. Such inference can be drawn not only from the nature of

injury inflicted but also can be deduced from other circumstances, and yet, at times may even be ascertained without any reference at all to actual wounds. In **Girja Shankar v. State of Uttar Pradesh**, reported in (2004) 3 SCC 793, it was held that it is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted and what the court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section and an attempt in order to be criminal need not be the penultimate act, and it is sufficient in law if there is present an intent coupled with some overt act in execution thereof. The overt act may not be an actual assault by the weapon on the body of the victim but may be a participation in the crime in some other form, like instigating the other accused to assault the victim or rendering the victim in supine and helpless condition or in some other manner facilitating the other accused to assault the victim in the manner he has been assaulted. In other words, the participation in the crime may not be by active act of assault along with the other accused but may be passive act in that regard, albeit with common intention. It is a joint action and not a common action, with common intention.

39. The circumstances and the events unfolded by

the evidence of the witnesses referred to above are incompatible with the innocence of the accused persons. It is pertinent to note that the accused executed their plan to put an end to the life of Vijay in a calculated manner. They first chose the place for commission of offence which could not be easily approachable to the family members of Vijay. Thereafter, they arranged him to be brought to the said place on the pretext of accompanying the accused for a walk. Once, at the place, they put him in such a situation that he was rendered totally supine and helpless to do anything in his defence or to obstruct the accused from committing murderous assault on him. After tying his hands and he being tied to a cot and made totally supine and helpless, he was brutally attacked on his head by the accused No.1 and other parts of body by the accused Nos.1 and 2 with the participation and instigation by the others, under the guise of obtaining confession regarding the alleged theft of a bicycle and imposing punishment on him by taking law in their hands. The contentions which were sought to be raised by the learned advocates for the accused do not rest on firm hypothesis.

40. For the reasons stated above, all the facts and circumstances brought on record point fingers to the accused persons being culprits and they having committed an offence of murder of Vijay by inflicting fatal injuries, including on the vital part of the

body, with dangerous weapon, with the common intention and knowledge about the result of such injuries on the body and further left the place of offence by leaving the victim unattended and in helpless condition for about three hours and by this brutal and inhumane act, all the accused have committed the offence punishable under Section 302 read with Section 34 of I.P.C.

41. Before parting with the matter, it is to be noted that as far as the accused No.3 Sanjay alias Jaya Nandkumar Ranbhise expired in September, 1995 and the accused No.5 Khandu Deoram Abhang expired in December, 1993. Apparently, the Appeal Nos.112 of 1993 and 111 of 1993 filed by the accused Nos.3 and 5, respectively, stand abated and disposed of accordingly. So also, the appeals filed by the State so far as they relate to the accused Nos.3 and 5, consequent to the death of the said accused, stand abated to the extent of the said accused.

42. In the result, the appeals filed by the State are to be allowed and the appeals filed by the accused are to be dismissed. Accordingly, the appeal Nos.110 of 1993, 116 of 1993, 114 of 1993 and 34 of 1993 are hereby dismissed. The appeal Nos.241 of 1993 and 242 of 1993 are hereby allowed. The impugned judgment passed by the learned Additional Sessions Judge, Nasik, in Sessions Case No.126 of 1992, so far as it relates to the acquittal of all the accused under Section 302 read with 34 of I.P.C., is hereby set

aside and the accused Nos.1, 2, 4 and 6 are held to be guilty of assaulting Vijay with deadly weapon with common intention and with the knowledge that the injuries to be inflicted by the weapon would result in his death, and, therefore, are guilty of murder of Vijay with the common intention punishable under Section 302 read with 34 of I.P.C. The conviction of the accused on other counts by the impugned judgment shall remain unaltered. On conviction under Section 302 read with 34 of I.P.C., all the four accused are sentenced to undergo life imprisonment and further each of them to pay fine of Rs.5,000/- in default to undergo rigorous imprisonment for one year by each of the accused. Needless to say that the sentence for the imprisonment of the accused to be suffered concurrently with the imprisonment under other provision of law, as stated above. The accused will be entitled to set off in respect of the period already undergone, if any, in accordance with the law in relation to the offences for which they have been convicted and sentenced herein. Bail bonds of the accused Nos.1, 2, 4 and 6 stand cancelled and they are directed to surrender forthwith to undergo the sentence imposed as above. Order accordingly. The appeals stand disposed off accordingly.

(R.M.S.KHANDEPARKAR, J)

(R.S.MOHITE, J)